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Fourth report on the protection of persons in the event of disasters

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I. Introduction*

A. Comments by Governments

1. At the sixty-second session of the International Law Commission in 2010, the Special Rapporteur submitted his third report on the topic of the protection of persons in the event of disasters (A/CN.4/629). In that report he provided an overview of the comments of States and the International Federation of Red Cross and Red Crescent Societies, made in the Sixth Committee of the General Assembly, on the work undertaken by the Commission thus far. He then examined the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and the question of the responsibility of the affected State. The report contained proposals for three further draft articles on humanitarian principles in disaster response (6), human dignity (7) and the primary responsibility of the affected State (8).

2. The Commission considered the third report at its 3054th to 3057th meetings, from 1 to 4 June 2010, and referred all three draft articles, 6 to 8, to the Drafting Committee.

3. Also at the 3057th meeting, the Commission provisionally adopted draft articles 1 to 5, which had been considered at the Commission's previous session, as submitted to the plenary in the report presented by the Chair of the Drafting Committee on 30 July 2009. Commentaries to draft articles 1 to 5 were likewise adopted by the Commission at its 3072nd meeting, on 2 August 2010. The text of draft articles 1 to 5, with commentaries, was reproduced in chapter VII.C of the report of the Commission on the work of its sixty-second session (A/65/10).

4. The Drafting Committee, in light of the discussion held in plenary, considering that the three draft articles proposed by the Special Rapporteur in his third report embodied distinct concepts which merited separate treatment, provisionally adopted the following four additional draft articles: humanitarian principles in disaster response (6); human dignity (7); human rights (8); and role of the affected State (9).

5. The four new draft articles were submitted to the plenary in a comprehensive report presented by the Chair of the Drafting Committee at the 3067th meeting of the Commission, on 20 July 2010. Owing to the lack of time for the preparation and adoption of the corresponding commentaries, the Commission, at that meeting, took note of draft articles 6 to 9 as provisionally adopted by the Drafting Committee. The text of the four draft articles was reproduced in a Commission document

* The Special Rapporteur expresses his appreciation to the following for their assistance in the preparation of the present report: René Urueña, Ph.D., Director of the International Law Programme, and Santiago Rojas, JD candidate, Law Faculty of Los Andes University, Bogotá; Arjen Vermeer, Ph.D. candidate, T.M.C. Asser Institute, The Hague; Stefanie Jansen, Ph.D. candidate, School of Law, University of Tilburg, Tilburg, Netherlands; Emma Dunlop, L.L.M., Law School of New York University, New York; Juan Carlos Ochoa, Ph.D., Postdoctoral Guest Researcher, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and Lucy Patchett, L.L.M. candidate, Lund University, Lund, Sweden; Emika Tokunaga, Ph.D. candidate and Visiting Researcher, School of International Public Policy, Osaka University, Osaka, Japan; and Paul R. Walegur, The Hague.

(A/CN.4/L.776) and in the aforementioned report of the Commission on the work of its sixty-second session.[1]

6. In October and November 2010, at the sixty-fifth session of the General Assembly, the Sixth Committee considered third report of the Special Rapporteur and the debate thereon held in the Commission, with particular attention being given to the nine draft articles on the protection of persons in the event of disasters already elaborated within the Commission.[2] Some States addressed draft articles 1 to 5, together with commentaries, as adopted by the Commission, as well as draft articles 6 to 9, provisionally adopted by the Drafting Committee. Other States limited their comments to draft articles 6 to 8, as originally proposed by the Special Rapporteur. States welcomed the progress made by the Commission in a short time and once again stressed the importance and timeliness of the topic.

7. Regarding the general scope of the topic, support was expressed for the emphasis in the commentary to draft article 1 on the rights and obligations of States in relation to persons in need of protection,[3] as well as for the inclusion of the pre-disaster phase, involving disaster risk reduction, prevention and mitigation activities, as suggested in paragraph (4) of the commentary.[4] The view was also expressed that the scope *ratione personae* of the draft articles should be focused on natural persons, not including legal persons.[5] It was suggested that provision should be made for the various issues and responsibilities that could arise for assisting and transit States.[6]

8. With respect to the purpose in draft article 2, support was expressed for the phrase "adequate and effective response", which was considered essential to the protection of persons in disaster situations; the phrase "with full respect for their rights" was likewise endorsed as being a reference that comprised not only basic human rights, but also acquired rights.[7]

9. Some States agreed with delimiting the definition of disaster so as to exclude other serious events that might disrupt the functioning of society.[8] Concern was expressed that draft article 3 set too high a threshold with the requirement of a "serious" disruption of the functioning of society[9] and therefore could exclude disasters that did not disrupt the society as a whole, thereby not entailing the

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), footnote 1295.

[2] The summary of the discussion in the Sixth Committee appearing below (paras. 7-25) inevitably resembles the one prepared by the Secretariat (A/CN.4/638, paras. 75-95). Nevertheless, its inclusion has been deemed useful since, unlike the Secretariat's, it identifies by name the States making statements, with reference to the corresponding records of the Sixth Committee.

[3] Switzerland (A/C.6/65/SR.22, para. 36).

[4] Thailand (A/C.6/65/SR.23, para. 71); see also Cuba (A/C.6/65/SR.23, para. 94) and Poland (A/C.6/65/SR.23, para. 99); the International Federation of Red Cross and Red Crescent Societies stated that "treating the role of civil society actors in disaster response only in a secondary manner, as paragraph (3) of the commentary to draft article 1 indicated, would leave a critical gap" (A/C.6/65/SR.25, para. 47)

[5] Ireland (A/C.6/65/SR.24, para. 53).

[6] Ibid.

[7] El Salvador (A/C.6/65/SR.23, para. 63).

[8] Switzerland (A/C.6/65/SR.22, para. 36) and El Salvador (A/C.6/65/SR.23, para. 64).

[9] Switzerland (A/C.6/65/SR.22, para. 36) and Thailand (A/C.6/65/SR.23, para. 72); see also Ireland (A/C.6/65/SR.24, para. 54).

Government's obligation to protect.[10] It was also noted that if "widespread loss of life, great human suffering and distress, or large-scale material and environmental damage" were only three possible outcomes among others, the words "inter alia" should precede them.[11] It was further suggested that the notion of "humanitarian response" also be defined.[12]

10. The view was expressed that draft article 4 on the relationship with international humanitarian law should be construed as permitting the application of the draft articles in situations of armed conflict to the extent that existing rules of international law did not apply.[13] It was also noted that it would be valuable for the future work to continue to take into account the distinction to be made depending on whether or not an armed conflict existed in the event of a disaster.[14]

11. With regard to the duty to cooperate set out in draft article 5, support was expressed for the reference to cooperation with international and non-governmental organizations; the Commission was called upon to consider developing provisions that would deal with the particular issues arising in respect of cooperation with such organizations.[15]

12. Agreement was expressed by several States with the inclusion of the principles of humanity, neutrality and impartiality in draft article 6, since those principles embodied elements that were useful in clarifying the underpinnings of third-State conduct with respect to a disaster that occurred in another State, albeit encompassing a significant measure of overlap.[16] It was proposed that the Commission consider including a reference to the principle of independence, the principle of non-interference in internal affairs of States and the principle of non-discrimination.[17]

13. The view was expressed that the principle of humanity was an important and distinct guiding principle.[18] It was also noted that it was not clear what was covered by the principle of humanity, which might be confused with the idea of human dignity set out in draft article 7, and therefore it was proposed that the Commission

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[10] Switzerland (A/C.6/65/SR.22, para. 36).

[11] Thailand (A/C.6/65/SR.23, para. 72).

[12] France (A/C.6/65/SR.23, para. 84).

[13] El Salvador (A/C.6/65/SR.23, para. 64); cf. Cuba (A/C.6/65/SR.23, para. 94) and Colombia (A/C.6/65/SR.20, para. 74) (noting that disasters arising as a result of armed conflict should not be included in the scope of the Commission's draft articles).

[14] Finland (on behalf of the Nordic States) (A/C.6/65/SR.22, para. 32).

[15] Monaco (A/C.6/65/SR.23, para. 88), Cuba (A/C.6/65/SR.23, para. 94) and Ireland (A/C.6/65/SR.24, para. 54); see also Islamic Republic of Iran (A/C.6/65/SR.24, para. 37); the International Federation of Red Cross and Red Crescent Societies stated that "problematic in the work on the draft articles was the fact that no distinction was drawn between domestic and international disaster response" (A/C.6/65/SR.25, para. 48).

[16] Switzerland (A/C.6/65/SR.22, para. 37), Greece (A/C.6/65/SR.22, para. 50), Czech Republic (A/C.6/65/SR.23, para. 24), Monaco (A/C.6/65/SR.23, para. 87), Poland (A/C.6/65/SR.23, para. 100) and Islamic Republic of Iran (A/C.6/65/SR.24, para. 37).

[17] Czech Republic (A/C.6/65/SR.23, para. 24) and Thailand (A/C.6/65/SR.23, para. 70) (focus on the principle of independence); Russian Federation (A/C.6/65/SR.23, para. 56) (focus on the principle of non-interference in internal affairs of States); Hungary (A/C.6/65/SR.21, para. 33), Ireland (A/C.6/65/SR.24, para. 55) and India (A/C.6/65/SR.25, para. 35) (focus on the principle of non-discrimination).

[18] Netherlands (A/C.6/65/SR.23, para. 44).

clearly elaborate the relationship between draft articles 6 and 7.[19] It was further suggested that it was preferable to locate it in a declaratory part of the instrument, such as the preamble.[20]

14. Some States agreed that the principle of neutrality was of particular importance so as to ensure that those providing assistance carry out their activities with the sole aim of responding to the disaster in accordance with humanitarian principles and not for purposes of interfering in the domestic affairs of the affected States.[21] The concern was expressed by some States that the principle of neutrality was closely connected with armed conflict and therefore could cause confusion and unnecessary complications, since even if construed more broadly, neutrality presupposed the existence of two opposing parties, which was not the case in the context of disasters.[22] It was also noted that, in the absence of armed conflict, impartiality and non-discrimination would cover the same ground as neutrality.[23]

15. It was stressed that the principle of impartiality was important and, concerning its proportionality component, it was asserted that the response to a disaster should be in proportion both to the practical needs of affected regions and peoples and to the capacity of affected States for providing their own relief and receiving relief from others.[24]

16. Support was expressed for the inclusion in draft article 6 of the principle of non-discrimination.[25] It was emphasized that the differential treatment of persons who were in different situations, mainly the particularly vulnerable, did not amount to discrimination.[26]

17. Some States concurred with draft article 7 on human dignity, reaffirming the relevance of the obligation to respect and protect the inherent dignity of the human person in the context of disaster response.[27] It was, nevertheless, pointed out that the concept was not entirely quantifiable in legal terms and served more as an overarching concept that should be taken into account in such situations.[28] Other States argued that human dignity might not be a human right per se, but rather a foundational principle on which the edifice of all human rights was built.[29] While it was proposed to cover the principle by a reference in the preamble,[30] others preferred retaining it in the text.[31] It was further suggested that the draft articles

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19 France (A/C.6/65/SR.23, para. 84).

20 Greece (A/C.6/65/SR.22, para. 50).

21 Switzerland (A/C.6/65/SR.22, para. 37), China (A/C.6/65/SR.22, para. 62), Pakistan (A/C.6/65/SR.24, para. 57) and Sri Lanka (A/C.6/65/SR.26, para. 43); see also Russian Federation (A/C.6/65/SR.23, para. 56).

22 Portugal (A/C.6/65/SR.23, para. 11) and Ireland (A/C.6/65/SR.24, para. 55); see also Austria (A/C.6/65/SR.23, para. 38).

23 Estonia (A/C.6/65/SR.23, para. 68) and Monaco (A/C.6/65/SR.23, para. 87); see also Austria (A/C.6/65/SR.23, para. 38).

24 China (A/C.6/65/SR.22, para. 63).

25 Hungary (A/C.6/65/SR.21, para. 33) and Indonesia (A/C.6/65/SR.24, para. 68).

26 France (A/C.6/65/SR.23, para. 84).

27 Czech Republic (A/C.6/65/SR.23, para. 24), Poland (A/C.6/65/SR.23, para. 100) and Sri Lanka (A/C.6/65/SR.26, para. 43).

28 Greece (A/C.6/65/SR.22, para. 51).

29 Pakistan (A/C.6/65/SR.24, para. 57); see also Indonesia (A/C.6/65/SR.24, para. 69) and Mexico (A/C.6/65/SR.25, para. 4).

30 Ireland (A/C.6/65/SR.24, para. 55).

31 Poland (A/C.6/65/SR.23, para. 100).

include a principle that would make it a requirement to protect the interests of the affected society, such as its main values and way of life.[32]

18. Some States agreed with draft article 8, as provisionally adopted by the Drafting Committee.[33] In that connection, it was recalled that a temporary derogation from some human rights obligation might at times be necessary so as to ensure prompt and efficient rescue activities in emergency situations.[34] It was also suggested that a reference to human rights be made instead in the preamble to the draft articles.[35]

19. Draft article 9 was provisionally adopted by the Drafting Committee on the basis of paragraph 1 of draft article 8, proposed by the Special Rapporteur in his third report. In that connection, many States agreed with the assertion in the text that the primary responsibility for the protection of persons and provision of humanitarian assistance on an affected State's territory lay with that State.[36] It was noted that the primacy of the affected States in the provision of disaster relief assistance was based on State sovereignty and flowed from the State's obligation towards its own citizens.[37] As a practical matter, the State where the disaster had taken place was best placed to assess its needs in disaster response on its territory and in the facilitation, coordination, direction, control and supervision of relief operations.[38] It was also suggested that the Commission include a specific mention of the principles of sovereignty and non-intervention.[39]

20. Support was expressed for the version of draft article 9, as provisionally adopted by the Drafting Committee, and in particular the reference to the affected State's "duty" to ensure the protection of persons and provision of disaster relief, rather than its "responsibility".[40] The concern was expressed that it was not clear what the content of the duty would be in legal terms, to whom it would be owed and what it would entail in practice.[41]

21. Paragraph 2 of draft article 8, as proposed by the Special Rapporteur in his third report and referred to the Drafting Committee, concerned the consent of the affected State.[42] In this regard, a number of States agreed with the proposition that external assistance could only be provided only with the consent of the affected State.[43] It was also said that States retained the right to decide whether to invite

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[32] Russian Federation (A/C.6/65/SR.23, para. 57).

[33] China (A/C.6/65/SR.22, para. 64), Czech Republic (A/C.6/65/SR.23, para. 24) and Russian Federation (A/C.6/65/SR.23, para. 57).

[34] Greece (A/C.6/65/SR.22, para. 52), China (A/C.6/65/SR.22, para. 64) and Russian Federation (A/C.6/65/SR.23, para. 57).

[35] France (A/C.6/65/SR.23, para. 85) and Ireland (A/C.6/65/SR.24, para. 55).

[36] Russian Federation (A/C.6/65/SR.23, para. 58), Estonia (A/C.6/65/SR.23, para. 69), Romania (A/C.6/65/SR.24, para. 48) and Spain (A/C.6/65/SR.24, para. 87).

[37] Pakistan (A/C.6/65/SR.24, para. 57).

[38] India (A/C.6/65/SR.25, para. 36).

[39] Indonesia (A/C.6/65/SR.24, para. 69).

[40] Switzerland (A/C.6/65/SR.22, para. 38).

[41] United Kingdom of Great Britain and Northern Ireland (A/C.6/65/SR.24, para. 65) and Republic of Korea (A/C.6/65/SR.25, para. 29); see also Ireland (A/C.6/65/SR.24, para. 55).

[42] See above, para. 2.

[43] Switzerland (A/C.6/65/SR.22, para. 38), Islamic Republic of Iran (A/C.6/65/SR.24, para. 37), Indonesia (A/C.6/65/SR.24, para. 68) and Republic of Korea (A/C.6/65/SR.25, para. 29).

other States to participate in relief activities in the light of the gravity of the disaster and its own rescue and relief capacities.[44]

22. Nonetheless, it was asserted that it was important to strike a balance between State sovereignty and human rights protection.[45] It was suggested that when an affected State failed to protect persons in the event of a disaster because it lacked either the capacity or the will to do so, the affected State should seek assistance from other States and international organizations in accordance with draft article 5.[46] In terms of a further view, a State should bear responsibility for its refusal to accept assistance, which could constitute an internationally wrongful act if such a refusal violated the rights of the affected persons under international law.[47] It was felt that caution should be taken in making such characterizations, which could have adverse consequences for international relations and justify intervention in an affected State.[48]

23. It was held that the question of consent to the activities of private and non-governmental actors deserved further discussion.[49] It was also noted that non-governmental organizations and other bodies needed simply to comply with the internal laws of the affected State.[50] The view was also expressed that, irrespective of any consent required, the international community might also have a certain responsibility, at least to offer assistance.[51]

24. The Commission was advised to adhere closely to actual State practice.[52] In that connection, it was suggested that it continue compiling and studying national legislation, international agreements and the practice not only of States but of non-State actors as well in order to elucidate the legal and practical aspects of the topic.[53] It was also suggested that the Commission interact closely with international organizations and non-governmental organizations operating in the field.[54]

25. Regarding the form of the Commission's work, it was stated that non-binding guidelines, a guide to practice or a framework of principles addressed to all actors would have more practical value and enjoy widespread acceptance.[55]

26. By written communications, dated, respectively, 5 and 17 January 2011, Cuba and El Salvador transmitted their comments on the work accomplished thus far by the Commission, as reflected in its report on the sixty-second session. Those communications will be circulated as internal documents of the Commission.

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[44] China (A/C.6/65/SR.22, para. 65), India (A/C.6/65/SR.25, para. 36), Chile (A/C.6/65/SR.26, para. 11) and Sri Lanka (A/C.6/65/SR.26, para. 44).

[45] Spain (A/C.6/65/SR.24, para. 87) and Brazil (A/C.6/65/SR.26, para. 72); see also Romania (A/C.6/65/SR.24, para. 48) and Mexico (A/C.6/65/SR.25, para. 6).

[46] Finland (on behalf of the Nordic States) (A/C.6/65/SR.22, para. 31), Portugal (A/C.6/65/SR.23, para. 12) and Netherlands (A/C.6/65/SR.23, para. 45).

[47] Portugal (A/C.6/65/SR.23, para. 13).

[48] Islamic Republic of Iran (A/C.6/65/SR.24, para. 36).

[49] Estonia (A/C.6/65/SR.23, para. 69).

[50] Islamic Republic of Iran (A/C.6/65/SR.24, para. 37), Ireland (A/C.6/65/SR.24, para. 56) and Japan (A/C.6/65/SR.25, para. 41).

[51] Austria (A/C.6/65/SR.23, para. 39).

[52] France (A/CN.6/65/SR.23, para. 86).

[53] Colombia (A/C.6/65/SR.20, para 74).

[54] Italy (A/CN.6/65/SR.23, para. 26).

[55] United Kingdom of Great Britain and Northern Ireland (A/C.6/65/SR.24, para 64) and Russian Federation (A/C.6/65/SR.23, para 58).

B. Related developments

27. In 2010, some 373 natural disasters killed over 296,800 people, affecting nearly 208 million others and costing nearly US$ 110 billion, according to the Centre for Research on the Epidemiology of Disasters (CRED) of the Catholic University of Louvain.[56] The increasing frequency and magnitude of natural disasters, including most recently the earthquake and tsunami in Japan, floods in Colombia and elsewhere and storms in the United States of America, have led States, intergovernmental and non-governmental organizations and academic institutions to turn their attention to the role of law at all stages of a disaster situation. In this connection, several international meetings have been convened to focus on different aspects of the subject, following the conclusion of the Commission's 2010 session. The Special Rapporteur has been invited to and participated in some of those meetings, including most recently the Consultation on Disaster Prevention and Recovery organized by the Conflict Prevention and Peace Forum under the auspices of the United Nations International Strategy for Disaster Reduction (New York, March 2011) and the symposium on "Rebuilding after the storm: the role of law in development post natural disasters" (Harvard Law School, November 2010), where he was a featured speaker. The Special Rapporteur will also be a featured speaker in January 2012 at the seminar on "Responding to the challenges of natural and industrial catastrophes: new directions for international law", organized by the Hague Academy of International Law.

II. Responsibility of the affected State to seek assistance where its national response capacity is exceeded

28. The Drafting Committee, having established that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory (see draft article 9), the Special Rapporteur will now consider the duties of an affected State when the magnitude or duration of a disaster exceeds the limits of that State's response capacity.

29. In determining the appropriate response of an affected State to a disaster that overwhelms its national response capacity, it is necessary to reiterate the core principles of State sovereignty and non-intervention. The International Court of Justice has characterized mutual respect for territorial sovereignty between independent nation States as an essential foundation of international relations.[57] The guiding principles annexed to General Assembly resolution 46/182[58] affirm that in the context of disaster response, "the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United

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[56] International Strategy for Disaster Reduction, press release, 24 January 2011.

[57] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment* of 9 April 1949, *I.C.J. Reports 1949*, p. 4 (noting that "between independent States, respect for territorial sovereignty is an essential foundation of international relations").

[58] See para. 3 of the guiding principles annexed to General Assembly resolution 46/182 of 19 December 1991 ("humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country"). See also the ASEAN Agreement on Disaster Management and Emergency Response, art. 3, para. 1 (noting that "external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party").

Nations". Consequently, implementation of international relief assistance is contingent upon the consent of the affected State, as the Special Rapporteur recognized in his third report by proposing paragraph 2 of draft article 8, which was subsequently referred to the Drafting Committee.

30. The Special Rapporteur reaffirms that the authorities of an affected State have primary responsibility for assisting the victims of disasters that occur within their territory. As outlined in draft article 9, paragraph 2, provisionally adopted by the Drafting Committee, an affected State has the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance. The primacy of an affected State stems both from its sovereign prerogatives and its responsibility towards the affected population within its territory. This latter basis is reflected in the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, which states:

> The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.[59]

31. The core principles of sovereignty and non-intervention and the requirement of State consent must themselves be considered in light of the responsibilities undertaken by States in the exercise of their sovereignty.[60] These obligations may be owed both horizontally, to other States in the international community, or vertically, to populations and individuals within a State's territory and control. Within the present topic, particular attention should be paid to the duties of States under international human rights instruments and customary international human rights law to provide protection to those persons within their territory. The scope of an affected State's duties towards persons affected by disasters and the interaction of these duties with the core principles of sovereignty and territorial integrity and the requirement of State consent to the provision of international aid, form the basis of the current inquiry.

A. Responsibility of the affected State towards individuals on its territory

32. Paragraph 1 of draft article 9 of the provisionally adopted draft articles stipulates that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The draft article affirms the primary importance of obligations undertaken by a State in respect of persons within its borders. As outlined by the Special Rapporteur in his preliminary report, a number of human rights are implicated in the

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[59] Resolution adopted by the Institute of International Law on 2 September 2003 at the session held in Bruges, Belgium, art. III, para. 1.

[60] *S.S Wimbledon*, PCIJ Series A, No. 1, 25 (1923) (noting that the Permanent Court "declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.").

context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.[61]

33. By way of example, an analysis of one of the implicated rights is useful in articulating the nature of an affected State's duties. The International Covenant on Economic, Social and Cultural Rights states that in pursuance of the right to food:

> [t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.[62]

The Committee on Economic, Social and Cultural Rights notes in General Comment No. 12 on the right to adequate food that if a State party maintains that resource constraints make it impossible to provide access to food to those in need:

> the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. ... A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.[63]

The General Comment clarifies that the "appropriate steps" to be taken by a State in the fulfilment of its obligations include seeking international assistance where domestic conditions are such that the right to food cannot be realized. It is relevant that this step is engaged where a State itself asserts that it is unable to carry out its obligations. The General Comment thus reflects that recourse to international support may be a necessary element in the fulfilment of a State's obligations towards individuals where it considers that its own resources are inadequate to meet protection needs.

34. Specific references to rights in the event of disasters are made in the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities. Under article 23 of the African Charter, States shall take "all appropriate measures" to ensure that children seeking or holding refugee status, as well as those who are internally displaced due to events including "natural disaster" are able to "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties". The wording "all appropriate measures" recalls the reference to "appropriate steps" in article 11 of the International Covenant on Economic, Social and Cultural Rights.

35. The Convention on the Rights of Persons with Disabilities refers to the obligation of States towards disabled persons in the event of disasters:

> States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international

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[61] See A/CN.4/598, para. 26.

[62] International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, art. 11.

[63] Economic and Social Council, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 12, E/C.12/1999/5, para. 17.

> human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The phrase "all necessary measures" may be considered to encompass recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel case* (merits) that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".[64] Draft article 6, provisionally adopted by the Drafting Committee, affirms the core position of the principle of humanity in disaster response.[65]

B. Cooperation

36. The duty to cooperate is also relevant to an affected State's responsibilities in the event that the effects of a disaster exceed its national capacity. Draft article 5, provisionally adopted by the Commission, affirms that:

> [i]n accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.[66]

The draft article recognizes that the duty to cooperate is incumbent upon not only third States, but also affected States where such cooperation is appropriate. This approach is also implicit in the report of the independent expert on human rights and international solidarity submitted to the Human Rights Council by the High Commissioner for Human Rights:

> [t]he obligations related to international assistance and cooperation are complementary to the primary responsibility of States to meet their national human rights obligations. International cooperation rests on the premise that developing countries may not possess the necessary resources for the full realization of rights set forth in human rights covenants and conventions. There is a shared responsibility for development met by States' national

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[64] See footnote 57, above, p. 22 (noting that "[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...").

[65] Draft art. 6 reads: "[r]esponse to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable".

[66] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 330.

> obligations and the obligations of international coopération, facilitating global implementation.[67]

This approach is also reflected in article 3, paragraph 3, of the Declaration on the Right to Development, in which the General Assembly notes:

> States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.[68]

37. Comments by a number of States support the link between the duty to cooperate and the responsibilities of an affected State in the event that its national capacity is overwhelmed. Finland commented during the discussion in the Sixth Committee on the 2008 report of the International Law Commission that "if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate with other States or organizations willing and able to do so".[69] This position was also taken in a statement made on behalf of the Nordic countries before the Sixth Committee in October 2010, in which it was noted that "[w]hen the affected State does not have the capacity or the will to protect and provide relief to the persons affected by the disaster, it should seek assistance from other States and international organizations in accordance with draft article 5 in order to fulfil its obligations".[70]

38. The Special Rapporteur reiterates that cooperation should not be interpreted in such a way as to diminish the prerogatives of a sovereign State within the international legal regime. The guiding principles annexed to General Assembly resolution 46/182 shed light on the relationship between the core principles of sovereignty and non-intervention, and the appropriate measures to be taken by a State in the fulfilment of its international responsibilities. The principles reaffirm that any humanitarian assistance should be provided "with the consent of the affected country and in principle on the basis of an appeal by the affected country".[71] While reiterating the central importance of State consent to any grant of international assistance, the Secretariat memorandum notes that the guiding principles also appear to support an implicit duty on affected States to engage in international cooperation where an emergency exceeds its response capacity.[72] In paragraph 5 of the annex, the General Assembly notes:

> The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.

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[67] A/HRC/9/10 (15 August 2008), para. 21.

[68] Declaration on the Right to Development (General Assembly resolution 41/128 of 4 December 1986, annex, art. 3(3)).

[69] A/C.6/63/SR.22, para. 53.

[70] Statement on behalf of the Nordic countries, Päivi Kaukoranta, Director-General, Legal Services, Ministry for Foreign Affairs of Finland, New York, 27 October 2010.

[71] See footnote 58 above.

[72] A/CN.4/590, para. 57 and footnote 204.

The framing of resolution 46/182 therefore draws attention to two distinct considerations. First, the prerequisite of State consent to any provision of assistance, and second, a potential responsibility to seek international assistance where national capacity is overwhelmed. The former directs attention towards the core requirements of territorial integrity and the horizontal obligations of States within the international legal regime. The latter directs attention rather towards an affected State's responsibilities towards its population.

39. The foregoing instruments suggest that the "internal" aspect of sovereignty, reflected in an affected State's primary responsibility towards persons within its territory, may encompass a duty to seek external support where national response capacities are overwhelmed. As the General Assembly notes in resolution 45/100, "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity".[73] This position was recently reaffirmed in the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters published by the Brookings-Bern Project on Internal Displacement:

> States have the primary duty and responsibility to provide assistance and protection to persons affected by natural disasters. In doing so, they are obliged to respect the human rights of affected persons and to protect them from violations of their rights by private actors (e.g. individuals and groups committing crimes) as well as from dangers arising from the disaster (e.g. secondary impacts of natural disasters).[74]

The centrality of the principle of human dignity to this topic is affirmed in draft article 7, provisionally adopted by the Drafting Committee.[75] Draft article 7 affirms the duty held by States, competent international organizations and relevant non-governmental organizations to respect and protect the inherent dignity of the human person when responding to disasters.

C. Formulations of a specific duty to seek assistance

40. The foregoing suggests that where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State's primary responsibilities under international human rights instruments and customary international law.

41. The Secretariat, in its preparatory study on the topic at hand, recognized a movement towards greater recognition of a positive duty on affected States to request assistance, at least where the affected State's response capacity is overwhelmed by a disaster.[76] This duty has been incorporated into non-binding international instruments addressing disaster relief. The principle appears in a resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003. Its article III, paragraph 3, reads:

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[73] General Assembly resolution 45/100 of 14 December 1990, sixth preambular paragraph.

[74] *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (January 2011), art. II, para. 1.

[75] A/CN.4/L.776.

[76] A/CN.4/590, para. 57.

> [w]henever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or de facto control, it shall seek assistance from competent international organizations and/or from third States.

42. Similarly, the international disaster response law guidelines of the International Federation of Red Cross and Red Crescent Societies state that:

> [i]f an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.[77]

A third formulation is incorporated in the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines), which note that "[i]f international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximize its effectiveness".[78]

43. The formulations of the duty in the 2003 Bruges resolution of the Institute of International Law and the international disaster response law guidelines of the International Federation of Red Cross and Red Crescent Societies share common attributes that can be linked to the foregoing discussion. First, a duty to seek international assistance only arises in cases where national incapacity is demonstrated. This prerequisite emphasizes that the duty to seek assistance arises out of an affected State's primary duty to provide protection to persons within its territory under international human rights law instruments and customary law. Second, the duty is framed as a duty to "seek" rather than a duty to "request" assistance.

44. The Special Rapporteur considers that a duty to "seek" assistance is more appropriate than a duty to "request" assistance in this context. A request for assistance carries an implication that an affected State's consent is granted upon acceptance of that request by a third State. The Secretariat memorandum reflects that a duty to request assistance may constrain a State's "ability to decline offers of assistance".[79] In contrast, the Special Rapporteur considers that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid. The term "seek" implies the initiation of a process through which agreement may be reached. As such the Special Rapporteur is of the opinion that a duty to seek assistance both ensures the protection of populations and individuals of concern, and is coherent with the core requirement of State consent. Consequently, the Special Rapporteur is of the opinion that a duty to seek assistance, rather than a duty to request assistance, provides the best foundation for this topic.

45. In light of the foregoing it is possible to propose the following wording for a draft article.

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[77] International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, 2007, guideline 3(2).

[78] *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief*, revised on 1 November 2007, para. 58.

[79] A/CN.4/590, para. 65.

Draft article 10
Duty of the affected State to seek assistance

The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.

46. This phrasing is a composite drawn from the 2003 Bruges resolution of the Institute of International Law (art. III, para. 3), the International Federation of Red Cross and Red Crescent Societies guidelines (3(2)) and General Assembly resolution 46/182. It also echoes the appropriate scope of cooperation encompassed in draft article 5, provisionally adopted by the Commission.[80] The term "seek" is adopted in light of the discussion above. The reference to "national response capacity" echoes the reference to a State's "response capacity" in resolution 46/182,[81] and "national coping capacities" in the international disaster response law guidelines of the International Federation of Red Cross and Red Crescent Societies.[82]

47. The term "assistance" reflects the broad ambit of operational aspects in the provision of humanitarian protection. As such it underscores an affected State's right to determine the scope and type of assistance that is best suited to the fulfilment of its responsibilities under international human rights law and customary international law. Humanitarian assistance has been defined in the 2003 Bruges resolution as "all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and fulfilment of the essential needs of victims".[83]

48. The draft article stresses that a duty to seek assistance arises only when the national response capacity of a State is exceeded. As noted during discussion of draft article 2 in the second report of the Special Rapporteur, not all disasters are considered to overwhelm a nation's response capacity.[84] As such the present draft article will only be applicable to a subset of disasters as defined in draft article 2.

49. The Special Rapporteur considers that the Government of a State will be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. This position is in line with the "margin of appreciation" principle adopted in the European Court of Human Rights, which holds that "the national authorities enjoy a wide margin of appreciation under article 15 [of the European Convention on Human Rights] in assessing whether the life of their nation is threatened by a public emergency".[85] A recognition of the central role of an affected State in determining that its national capacity has been exceeded is also consistent with the core principle articulated in the annex to General Assembly resolution 46/182 that "humanitarian assistance should be provided with the consent

[80] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 330.

[81] See para. 5 of the guiding principles annexed to General Assembly resolution 46/182 (noting that "[t]he magnitude and duration of many emergencies may be beyond the response capacity of many affected countries").

[82] See footnote 77 above.

[83] Resolution adopted by the Institute of International Law on 2 September 2003 at its session held in Bruges, Belgium, art. I, para. 1.

[84] A/CN.4/615, para. 46.

[85] *A and Others v. the United Kingdom* [GC], App. No. 3455/05, ECHR 2009.

of the affected countries and in principle on the basis of an appeal by the affected country".[86]

50. The Special Rapporteur finds this formulation to be consistent with comments made by States in the Sixth Committee, recorded in the 2008 report of the Commission on the work of its sixtieth session, that "if an affected State cannot discharge its obligation to provide timely relief to its people in distress it must have an obligation to seek outside assistance",[87] and reiterated in the Sixth Committee's discussion in 2010 on the Commission's report on the work of its sixty-second session.[88]

III. Duty of the affected State not to arbitrarily withhold its consent to external assistance

51. As a starting point the Special Rapporteur wishes to emphasize that in most cases of disaster response there is a willingness on the part of the affected State to allow for assistance and access in order to succour the victims, particularly in cases where the authorities were unable to cope with the disaster situation and there existed a clear need to bring relief to those affected by the disaster.[89] This is not to say that such a general practice is conclusive of a legal obligation to allow for external assistance.

52. Consent is the expression of the will of the sovereign who, thereby, permits activities on its territory that may otherwise constitute violations of the principle of non-intervention. Consent, thus, also has a main role to play in the acceptance or refusal of humanitarian assistance in disasters. As a matter of international law, the affected State has a right to refuse an offer. However, this right is not unlimited. In his third report, the Special Rapporteur underscored that sovereignty also entails obligations.[90]

53. There have been several examples in which the position of persons affected by a disaster worsened due to the denial that the situation constituted a disaster or because the appropriate relief or offers thereof were not consented to or consented to after an extended period of time. All these factors, whatever the reasons behind them, contributed to the aggravation of an already vulnerable situation. The General Assembly has therefore made it abundantly clear in its resolutions 43/131[91] and 45/100[92] that

> the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity.

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[86] See footnote 58 above.

[87] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 243.

[88] See para. 22 above.

[89] Recent examples are provided by the response to the earthquakes that struck New Zealand and Japan in February and March 2011, respectively. See www.reliefweb.int (last accessed 20 March 2011).

[90] A/CN.4/629, para. 75.

[91] Of 8 December 1988, eighth preambular paragraph.

[92] Of 14 December 1990, sixth preambular paragraph.

54. Assistance to persons affected by the disaster is indispensable, especially if the inability or unwillingness of the affected State to respond adequately and effectively jeopardizes, or even violates, the rights and dignity of those affected. Since consent to assistance is sanctioned by international law, rather than disregarding it, a limitation on its exercise also grounded in international law may be justified. A suggestion to this effect has been made in the plenary of the Commission:

> that consideration be given to recognizing the legal consequences of the responsibility of the affected State by stating that its consent "shall not unreasonably be withheld", without prejudice to its sovereign right to decide whether or not external assistance was appropriate.[93]

55. States interacting in response to disasters have the duty to cooperate in good faith with one another to meet the needs of persons affected by a disaster. The importance of the duty to cooperate has been recognized by the Commission when it provisionally adopted draft article 5.[94] In his second report, the Special Rapporteur has described this duty in some detail.[95] The duty to cooperate shapes the legal framework within which the consent of the affected State manifests itself and reinforces the argument that consent is part and parcel of the international legal order, but that limitations may nevertheless be placed on it. In the context of humanitarian assistance the argument has been made, for example, by the Representative of the Secretary-General on internally displaced persons, that:

> It can be argued that this duty to cooperate is referenced as the leading basis for two General Assembly resolutions reaffirming the primary responsibility of States to provide assistance to victims of natural disasters and similar emergencies that occur within their territory. This duty implies a corollary obligation of States to receive international assistance when offered and needed.[96]

56. The Representative's assertion presupposes that the sovereignty of the State should be exercised in the way that best contributes to the protection and assistance of those in need.[97] It is recalled in this connection that the Commission has already acknowledged that the affected State has the obligation, *by virtue of its sovereignty*, to ensure the protection of persons and the provision of humanitarian assistance to them on its territory.[98]

57. The obligation of the affected State to ensure such protection and assistance in the event of a disaster aims at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. It thus reaffirms the State's paramount duty to secure the enjoyment of the right to life of those under its jurisdiction, as grounded in international law. While the right

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[93] A/65/10, para. 323.

[94] Ibid., paras. 298, 299 and 331.

[95] A/CN.4/615, paras. 50-70.

[96] E/CN.4/1996/52/Add.2 (5 December 1996), para. 362 (footnotes omitted).

[97] In the words of E. Lauterpacht: "to give effect, through appropriate limitation and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international." E. Lauterpacht (ed.), *International Law: Collected Papers of H. Lauterpacht* (1975), vol. II, part 1, p. 47.

[98] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), footnote 1295, draft art. 9.

to life has been explicitly recognized in all major human rights instruments and is extensively dealt with by universal and regional human rights institutions, it has at the same time acquired a more general status in international law.[99]

58. Restrictions on the right to refuse humanitarian assistance can be found in various legal regimes aimed at the protection of persons, such as international human rights law, the law concerning internally displaced persons and international humanitarian law. The work currently undertaken by the Commission on the protection of persons in the event of disasters can therefore benefit from the tenets informing those regimes, as was already explained by the Special Rapporteur in his preliminary report.[100]

59. International human rights law encapsulates, to a certain extent, a balance of interests between States inter se and between the State and persons on its territory and under its jurisdiction. The obligations are owed not only to other State parties to a particular convention but may equally be said to be owed to those individuals. To ensure the fulfilment of those obligations, an external dimension may also be made explicit or implicit in the various human rights instruments. The Human Rights Committee has interpreted the right to life, as embodied in article 6 of the International Covenant of Civil and Political Rights, to contain the obligation for States to adopt positive measures to ensure the enjoyment of this right.[101] An offer of assistance that is met with refusal might thus, under certain conditions, constitute a violation of the right to life. Moreover, for the rights which are established in the International Covenant on Economic, Social and Cultural Rights,[102] mention must be made of the general obligation described in article 2, paragraph 1, of that instrument. This provision states that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present

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[99] B. G. Ramcharan, "The Concept and Dimension of the Right to Life", in B. G. Ramcharan (ed.), *The Right to Life in International Law* (1985), p. 3.

[100] See A/CN.4/598.

[101] Human Rights Committee, General Comment No. 6, para. 5: "The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures." Other human rights institutions, such as the Inter-American Court of Human Rights and the European Court of Human Rights have interpreted the right to life in a similar fashion. Note that the General Assembly has expressed indirectly the connection between the lack of access to humanitarian assistance and human rights law in its resolutions 43/131 and 45/100 (see footnotes 91 and 92, respectively, above and accompanying text).

[102] Relevant rights in this regard include the rights to food, to be free from hunger, to housing and to clothing (art. 11), the rights to health and medical services (art. 12), the rights to water and sanitation (art. 12) and the right not to be discriminated against (art. 2(2)). In the context of the protection of internally displaced persons, the Representative of the Secretary-General has correctly stated the following: "Thus, it can be argued that States parties to the ICESCR have a duty to at least refrain from unreasonably denying offers of international assistance in cases of imminent humanitarian problems seriously affecting the subsistence needs of internally displaced persons and, perhaps, an obligation to accept reasonable offers.... A refusal to accept an offer of international cooperation and assistance where necessary to realizing subsistence rights recognized under the treaty could be considered to constitute, at the least, 'a deliberately retrogressive measure' and, at most, a breach of treaty obligations" (E/CN.4/1996/52/Add.2, para. 365 (footnotes omitted)).

> Covenant by all appropriate means, including particularly the adoption of legislative measures.

60. From this text it follows that States, in order to realize the human rights enshrined in the International Covenant on Economic, Social and Cultural Rights must cooperate internationally. If the affected State is a party to the Covenant and is not capable of addressing the consequences of a disaster to a sufficient extent, it is obliged to cooperate. Therefore, the duty to cooperate not only does provide a basis for the requirement of consent as presently described, but it further underlines that treaty law implies a duty not to withhold consent arbitrarily.

61. The guiding principles on internal displacement,[103] which have been welcomed by the United Nations Commission on Human Rights and the General Assembly in unanimously adopted resolutions, are referred to by the Secretary-General as "the basic international norm for protection" of internally displaced persons.[104] Guiding principle 25, paragraph 2, in fine, reads:

> Consent [to offers of providing humanitarian assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.[105]

62. In this text it is established not only that consent is required before assistance can be provided, but also that such consent "shall not be arbitrarily withheld". This qualification is especially valid in situations where the affected State is either "unable" or "unwilling" to provide the assistance which is required in a particular situation.[106] Thus, in this context, the sovereign right to give consent has been recognized, but with the qualification that in certain circumstances consent "shall not be withheld arbitrarily".

63. International humanitarian law includes various provisions stipulating the obligations of a party to an international armed conflict and a non-international armed conflict, and the obligations of an occupying power. Article 59 of the Fourth Geneva Convention states as a positive obligation that:

> If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power *shall agree* to relief schemes on behalf of the said population, and *shall facilitate* them by all the means at its disposal.[107]

The need of the population operates here as the trigger for the obligation to agree to and to facilitate relief schemes on behalf of the population in an occupied territory.

64. In non-occupied territory under the control of a party to an international conflict, article 70, paragraph 1, of the first Protocol Additional to the Geneva Conventions provides that:

> If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in article 69, relief actions which are humanitarian and

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[103] E/CN.4/1998/53/Add.2.

[104] A/59/2005, para. 210.

[105] E/CN.4/1998/53/Add.2, principle 25, para. 2.

[106] The issue of being "unable or unwilling" is dealt with below (paras. 70 and 71).

[107] Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949), art. 59 (emphasis added by the Special Rapporteur).

> impartial in character and conducted without any adverse distinction shall be undertaken, *subject to the agreement* of the Parties concerned in such relief actions.[108]

In this case not only the need of the population but also the nature of the relief action is taken into account with regard to the obligation to consent to humanitarian assistance. The rule provides that there must be agreement before humanitarian actions for the benefit of a civilian population shall be undertaken.

65. Consent is more explicitly required by article 18 of the second Protocol Additional to the Geneva Conventions, which reads:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent* of the High Contracting Party concerned.[109]

This provision, relating to situations occurring within the borders of a State, as is also often the case with disasters, confirms the rule that humanitarian assistance must be preceded by the consent of the State on whose territory the assistance will be delivered. In the event of disasters, that State would be the affected State.

66. However, the question has been raised to what extent States are free to give or to withhold their consent in an armed conflict. The draft versions of the Additional Protocols of 1972 and 1973 contained an obligation to accept relief, if the relief answered to certain requirements such as impartiality and humanity.[110] In order to protect the sovereignty of the State accepting relief, the requirement of consent was added, while clearly stating that this condition:

> did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.[111]

Accordingly, it has been held that consent cannot be withheld arbitrarily, as it would otherwise deprive the provision of its meaning.[112]

67. The Institute of International Law dealt twice with the question of consent in the context of humanitarian assistance. Its 1989 resolution on the "Protection of human rights and the principle of non-intervention in the domestic concerns of States", article 5, paragraph 2, states in the original French text:

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[108] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 70(1) (emphasis added by the Special Rapporteur).

[109] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 18 (emphasis added by the Special Rapporteur).

[110] ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949* (1973), pp. 78 and 79.

[111] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), para. 2805.

[112] M. Bothe, "Relief Actions", in R. Bernhardt, *Encyclopedia of Public International Law* (2000), p. 171.

> Les États sur le territoire desquels de telles situations de détresse [où la population est gravement menacée dans sa vie ou sa santé] existent *ne refuseront pas arbitrairement* de pareilles offres de secours humanitaires.[113]

68. In 2003 the Institute dealt with this issue again. The resolution it adopted on the matter of refusal of consent is pertinent in a number of ways. The relevant text under the heading of the "Duty of affected States not arbitrarily to reject a bona fide offer of humanitarian assistance" reads:

> Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

Interestingly, the members of the Institute thought it necessary to add "unjustifiably" to "arbitrarily". This may signify that, in their view, the inclusion of the word "arbitrarily" alone left too implicit the need for the statement of reasons justifying the decision to reject a bona fide offer.

69. There is yet a last notable private undertaking by Professor Dietrich Schindler, who in 1995 had drawn up a set of rules derived from a number of legally binding and non-binding instruments, some of which have been dealt with above. His rule 6 states the following:

> States have a duty to admit humanitarian assistance furnished by States, IGOs or NGOs in accordance with international law. They may not arbitrarily refuse their consent.[114]

70. The foregoing analysis is of particular relevance to an affected State that does not have the required resources or does not wish to activate those resources to provide protection and assistance to persons in need on its territory. In other words, when a State is unable or unwilling to protect and assist persons on its territory affected by a disaster, a provision to reasonably limit the general rule on consent may be justified. Indeed, in order to effectively discharge the obligation of the State to ensure protection and assistance, the Special Rapporteur concludes that consent as a fundamental right of the State cannot be used if it results in the lack or reduction of protection and assistance when appropriate external assistance is needed and available.

71. The determination of when a State's conduct amounts to that State being unable or unwilling is to be arrived at in light of the specific circumstances of each case and cannot be exhaustively dealt with. The objective element of inability may be satisfied if the affected State clearly lacks the required goods or services. A State can be considered to be unwilling to provide assistance when it does possess the

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[113] Institute of International Law, Session of Santiago de Compostela, "Protection of human rights and the principle of non-intervention in the domestic concerns of States" (13 December 1989), art. 5, para. 2 [emphasis added by the Special Rapporteur]. Included in the French text is clear mandatory language, while the English translation reads: "States in whose territories these emergency situations exist *should* not arbitrarily reject such offers of humanitarian assistance." The Special Rapporteur has taken the liberty to explain "telles situations de détresse", by borrowing the words from the text of ibid., art. 5, para. 1.

[114] UNESCO, SHS-95/CONF.805/6, para. 6.

necessary resources and capacity for adequate relief, but has indicated that it does not wish to use those resources or capacity.

72. Whether or not a decision not to accept assistance is arbitrary depends on the circumstances of the case and should be determined on a case-by-case basis. Practice in this regard is inconclusive and therefore of little value in order to distil a general rule. The above-mentioned examples may already provide an indication of what might be considered arbitrary for the purpose of accepting or rejecting humanitarian assistance.

73. As already mentioned, the lack of a clear need to provide assistance may be a reason for refusal which is not arbitrary.[115] Another reason to reject humanitarian assistance that is not arbitrary may be found when certain criteria are not met. In draft article 6, as provisionally adopted by the Drafting Committee, it has been recognized that humanitarian assistance must conform to certain humanitarian principles. The principle of humanity must ensure that assistance is focused on the rights and needs of the persons affected.[116] "Neutrality" and "impartiality" imply that assistance which is being offered does not have any political connotations. Moreover, these humanitarian principles also mean that the assistance offered does not call for anything in return. Therefore, conformity with the principles makes sure that assistance activities are "not undertaken for purposes other than responding to the disaster".[117] Draft article 6, as provisionally adopted, thus ensures that the humanitarian assistance which is offered to an affected State shall meet certain standards in order to provide sufficient grounds, in principle, for it to be accepted. Therefore, if an offer does indeed meet those criteria, the affected State must possess very strong and valid reasons for choosing not to give its consent. If it withholds its consent without such reasons being present, a State may be considered to have done so "arbitrarily".

74. Furthermore, the decision to reject humanitarian assistance implies an obligation of the affected State to, at least, furnish the assisting State with legitimate grounds to substantiate such a decision. This conclusion is most apparent in the context of international humanitarian law, where, according to the commentary to article 70 of Additional Protocol I, agreement may "only be refused for valid reasons, not for arbitrary or capricious ones".[118] Next to this statement, it is explained in the commentary that:

> (i)f the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and

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[115] See Special Representative of the Secretary-General, above note 13. D. Schindler, *Yearbook, Institute of International Law*, vol. 70-I (2002-2003), p. 413, uses the term "un besoin urgent d'aide". Hardcastle and Chua view the need to sustain life and dignity in natural disasters as sufficient ground to justify an obligation to accept humanitarian assistance. R. J. Hardcastle and A. T. L. Chua, "Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters", *International Review of the Red Cross*, No. 325, p. 589.

[116] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 310.

[117] Ibid., para. 311.

[118] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), paras. 2795 and 2805.

> non-discrimination is able to remedy this situation, relief actions must take place. ... The authorities ... cannot refuse such relief without good grounds.[119]

According to this passage, "not withholding consent arbitrarily" means that a State must have strong and valid reasons for not giving consent when the population is in need of assistance. Thus, for the affected State not to withhold its consent arbitrarily also requires its stating the reasons for its decision not to consent. A more transparent mechanism contributes to the effectiveness of the system of protection and assistance in the event of disasters.

75. Moreover, the time to decide on an offer of humanitarian assistance cannot be extended unjustifiably. The expediency with which relief is provided is crucial. It is in the interest of all parties involved to know as soon as possible what the affected State decides regarding the external assistance or the offer thereof. In this spirit the General Assembly included the following paragraphs in its resolutions 43/131[120] and 45/100:[121]

> Concerned about the difficulties that victims of natural disasters and similar emergency situations may experience in receiving humanitarian assistance,
>
> Convinced that, in providing humanitarian assistance, in particular the supply of food, medicines or health care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number

The 2000 Framework Convention on Civil Defence Assistance[122] includes in article 3, paragraph (e), among the principles that States Parties undertake to respect in terms of providing assistance in the event of a disaster, the following:

> (e) Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time

Any delay should be justified accordingly. In the context of international armed conflicts, the International Committee of the Red Cross commentary to article 70 of Additional Protocol I states that "in concrete terms, the delay can only really be justified if it is impossible for reasons of security to enter the territory where the receiving population is situated".[123] Similarly, reasons of national security might be valid to justify a delay in the decision to accept or not an offer of assistance in the event of a disaster. The decision to refuse or accept humanitarian assistance should therefore be made for good reasons and without delay on the part of the affected State.

76. In conclusion, the rule on consent to humanitarian assistance must be in line with the purpose of the work of the Commission on this topic, defined in draft article 2, as provisionally adopted by the Commission.[124] To reinforce this purpose, both in terms of the adequateness and effectiveness of the response, humanitarian assistance should not be arbitrarily objected to if required and appropriate to meet the essential needs of the persons concerned, with full respect for their rights. The

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[119] Ibid, para. 4885.

[120] Of 8 December 1988, ninth and tenth preambular paragraphs.

[121] Of 14 December 1990, eighth and ninth preambular paragraphs.

[122] United Nations, *Treaty Series*, vol. 2172, No. 38131, p. 213.

[123] See footnote 118 above, ibid., para. 2846.

[124] *Official Records of the Sixty-fifth Session of the General Assembly, Supplement No. 10* (A/65/10), para. 330.

position of the persons in need in all protection regimes and in the language adopted by the General Assembly is thus central to justifying a limitation on consent. In addition, the operational aspects involved may benefit from more clarity and transparency to enhance the response system, requiring the affected State to explain its conduct, in particular in case of refusal of humanitarian assistance.

77. Bearing these considerations in mind, the Special Rapporteur proposes the following draft article:[125]

Draft article 11
Duty of the affected State not to arbitrarily withhold its consent

1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.

IV. Right to offer assistance in the international community

78. Throughout the discussion of the Special Rapporteur's three prior reports and from the resulting provisional adoption of nine draft articles within the Commission, valuable guidance has been provided as to the international legal basis for the protection of persons in the event of disasters. Solidarity underpins the principles of humanity, neutrality, impartiality and non-discrimination, which have emerged as the juridical framework that defines the present undertaking (draft article 6). Protection of the individual, in turn, remains its ultimate goal and inspiration, reflected in the Commission's concern with the inherent dignity of the human being (draft article 7) and the protection of human rights (draft article 8).

79. In turn, the role of the affected State has been considered by the Commission. Its definition has also been inspired by dignity and human rights, as the affected State has the duty to ensure the protection of persons on its territory. Similarly, it is primarily responsible for the direction, control, coordination and supervision of efforts to provide relief and assistance therein (draft article 9).

80. Thus understood, the protection of persons in the event of disasters is a project of the international community as a whole, which is hinged upon the primary responsibility of the affected State and its sovereignty. Such is the cornerstone of the legal structure that is framed by the principles of humanity, neutrality, impartiality and non-discrimination, underpinned by solidarity.

81. Non-affected States, as members of the international community, have an interest in the protection of persons in the event of disasters not occurring within their territory. This interest needs to be understood in the context of the primary responsibility of the affected State in the protection of persons in its territory, as it also is an expression of the principle humanity, underpinned by solidarity.

[125] This draft article follows immediately the text on consent proposed by the Special Rapporteur as para. 2 of draft art. 8, in his third report (A/CN.4/629, para. 96), which was referred to and is currently under consideration by the Drafting Committee.

Furthermore, recognition of such interest is instrumental to the preservation of human dignity in the event of disasters, and the protection of human rights.

82. Perhaps the most salient instance of the interest of non-affected States in the protection of persons outside their territory is the event of a health hazard. In that case, the 2005 International Health Regulations[126] impose on all States members of the World Health Organization (WHO) the duty to report evidence that a human victim outside their territory is not being appropriately treated. Under article 9, paragraph 2:

> States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk identified outside their territory that may cause international disease spread, as manifested by exported or imported:
>
> (a) Human cases;
>
> (b) Vectors which carry infection or contamination; or
>
> (c) Goods that are contaminated.

83. This dual nature of the disaster as primary responsibility of the affected State or States, on the one hand, and as a global event of interest for the international community as a whole, on the other, has been noted before by the 186 States that adopted the 2005 Hyogo Framework for Action,[127] paragraph 13 (b) of which confirms the 1994 Yokohama Strategy, and provides:

> Taking into account the importance of international cooperation and partnerships, each State has the primary responsibility for its own sustainable development and for taking effective measures to reduce disaster risk, including for the protection of people on its territory, infrastructure and other national assets from the impact of disasters. At the same time, in the context of increasing global interdependence, concerted international cooperation and an enabling international environment are required to stimulate and contribute to developing the knowledge, capacities and motivation needed for disaster risk reduction at all levels

84. An appropriate point of complementarity between the primary responsibility of the affected State and the interest of non-affected States in the protection of persons in the event of disasters may be found in the form of the latter's right to offer assistance in the event of disasters. Offering assistance in the international community is the practical manifestation of solidarity, informing the present undertaking since its early inception. As such, it is the logical corollary of the recognition that the protection of persons in the event of disasters is an inherently global matter, which strains the capacity of the affected sovereign State, yet confirms the importance of its role as the primary responsible for the protection of its population.

85. Such a holistic approach to conflicts has been long part of the evolution of international law, most notably in the context of international humanitarian law. As early as 1907, the Convention for the Pacific Settlement of International Disputes

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126 WHO resolution WHA58.3.

127 International Strategy for Disaster Reduction (ISDR). *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, World Conference on Disaster Reduction (18-22 January 2005).

(Hague I)[128] established the right of third parties to offer their assistance in the event of an international dispute, while recognizing the right of the States in dispute to reject the means of reconciliation that could be offered. Under article 3 of the Convention:

> Independently of this recourse, the Contracting Powers deem it expedient and desirable that one or more Powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the States at variance.
>
> Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.
>
> The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.

86. Moreover, the same principle providing for the right to offer assistance of third parties can be found in subparagraph (2) of common article 3 of the 1949 Geneva Convention:[129]

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> ...
>
> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

87. Similarly, article 18 of Protocol II to the 1949 Geneva Conventions has recognized the right of third parties to offer assistance in the case of conflict:

> 1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
>
> 2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

A. Offers of assistance by non-affected States

88. The holistic mindset has inspired more recent international legal developments, outside the laws of armed conflict. Specifically concerned with the

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[128] Concluded at The Hague on 18 October 1907.

[129] See, for example, the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, United Nations, *Treaty Series*, vol. 75, No. 970, p. 31.

present undertaking, the State's right to offer assistance in the context of disaster response has also been recognized in multiple international treaties. In the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[130] article 2, paragraph 4, creates a system of an open offer of assistance in the event of nuclear disasters, in the following terms:

> States Parties shall, within the limits of their capabilities, identify and notify the Agency of experts, equipment and materials which could be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency as well as the terms, especially financial, under which such assistance could be provided.

89. In turn, the 1991 Inter-American Convention to Facilitate Disaster Assistance[131] features that right in article I, paragraph b, providing that, "... acceptance by a State party of an offer of assistance from another State party shall be considered to be a request for such assistance". Article II of the same Convention develops the rules applicable to the possibility of offering assistance on the basis of a prior offer by the non-affected State, followed by the voluntary acceptance of the affected State. The system is set out in the Convention in the following terms:

> a. Requests for and offers and acceptance of assistance from one State party to another shall be communicated via diplomatic channels or the National Coordinating Authority, as the circumstances may warrant.
>
> b. Upon the occurrence of a disaster the assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster.
>
> c. To facilitate assistance, a State party that accepts it shall promptly notify its competent national authorities and/or its National Coordinating Authority to extend the necessary facilities to the assisting State, in accordance with this Convention.

90. A similar solution was found in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[132] which also contains language recognizing the right to offer assistance. According to article 4, paragraphs 5 and 6:

> 5. No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party. The requesting State Party shall retain the authority to reject all or part of any telecommunication assistance offered pursuant to this Convention in accordance with the requesting State Party's existing national law and policy.
>
> 6. The States Parties recognize the right of requesting States Parties to request telecommunication assistance directly from non-State entities and intergovernmental organizations, and the right of non-State entities and intergovernmental organizations, pursuant to the laws to which they are subject, to provide telecommunication assistance to requesting States Parties pursuant to this Article.

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[130] United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133.

[131] OAS Registration No. A-54.

[132] United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.

91. Confirming the pattern, the 2000 Framework Convention on Civil Defence Assistance[133] establishes in article 3:

> The States Parties undertake to respect the following principles in terms of providing assistance when a State is threatened or affected by a disaster:
>
> (a) Only assistance requested by the Beneficiary State or proposed by the Supporting State and accepted by the Beneficiary State may take place.
>
> (b) All offers of assistance shall respect the sovereignty, independence and territorial integrity of the Beneficiary State as well as the principle of non-intervention in the internal affairs of this State and should be carried out with due respect for its ways and customs. Such assistance should not be viewed as interference in the internal affairs of the Beneficiary State.
>
> (c) Assistance shall be provided without discrimination, particularly with regard to race, colour, sex, language, religion, political or any other opinion, to national or social origin, to wealth, birth, or any other criterion.
>
> (d) Assistance shall be undertaken in a spirit of humanity, solidarity and impartiality.
>
> (e) Offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.

92. More recently, the 2005 ASEAN Agreement on Disaster Management and Emergency Response[134] established the following guiding principle (article 3, paragraph 1):

> The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement. In this context, each affected Party shall have the primary responsibility to respond to disasters occurring within its territory and external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party.

93. The right to offer assistance is recognized as well by a wealth of other international instruments. The United Nations Committee on Economic, Social and Cultural Rights has put forward the individual responsibility of States to contribute in times of emergency, and their interest in doing so, in its General Comment No. 14 (2000),[135] concerned with the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), paragraph 40 of which reads:

> States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of

[133] See footnote 122 above.
[134] *ASEAN Documents Series 2005*, p. 157.
[135] See E/C.12/2000/4.

resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

94. Moreover, a number of expertise-based organizations, concerned with the development of international law, have also put forward the right to offer assistance in the event of disasters. Thus, the Institut de Droit international in article 5 of its 1989 resolution on the protection of human rights and the principle of non-intervention in internal affairs of States,[136] stated:

> An offer by a State, a group of States, an international organization or an impartial humanitarian body such as the International Committee of the Red Cross, of food or medical supplies to another State in whose territory the life or health of the population is seriously threatened cannot be considered an unlawful intervention in the internal affairs of that State. However, such offers of assistance shall not, particularly by virtue of the means used to implement them, take a form suggestive of a threat of armed intervention or any other measure of intimidation; assistance shall be granted and distributed without discrimination.
>
> States in whose territories these emergency situations exist should not arbitrarily reject such offers of humanitarian assistance.

95. Developing such principle, the Institut de Droit international has more recently given content to a specific right to offer assistance in its 2003 resolution on humanitarian assistance.[137] Under article IV, there is a specific

> *Right to offer and provide humanitarian assistance*
>
> 1. States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.
>
> 2. States and organizations have the right to provide humanitarian assistance to victims in the affected States, subject to the consent of these States.

B. Offers of assistance by international organizations and other humanitarian actors

96. The interest of the international community in the protection of persons in the event of disasters can be better achieved through the expedient involvement of international organizations and other humanitarian actors, always in the framework

[136] See G. Sperduti (Rapporteur), "The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States", *Annuaire de l'Institut de Droit international*, vol. 63 (1989), p. 338; see also footnote 113, above.

[137] See B. Vukas (Rapporteur), "Humanitarian Assistance" 71, *Annuaire de l'Institut de Droit international* (2004), p. 262.

of the principles of humanity, neutrality, impartiality and non-discrimination, underpinned by solidarity.

97. Several of the aforementioned instruments establishing a right to offer assistance on behalf of non-affected States extend that benefit to international organizations and other humanitarian actors. Moreover, offers of assistance from these actors have also been addressed specifically and belong as well to the *acquis* of the international law of disaster response.

98. In the ambit of the United Nations, the Secretary-General has been deemed competent to call upon States to offer assistance to victims of natural disasters and other disastrous situations, e.g., in General Assembly resolutions 43/131 (Humanitarian assistance to victims of natural disasters and similar emergency situations), 36/225 (Strengthening the capacity of the United Nations system to respond to natural disasters and other disaster situations) and 46/108 (Assistance to refugees, returnees and displaced persons in Africa).

99. The World Health Organization, in turn, has been given the express power to offer its assistance in the event of a global health hazard. According to article 10, paragraph 3, of the 2005 International Health Regulations,

> When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.

100. In similar terms, under article 5, paragraph (d), of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, the International Atomic Energy Agency was given the power to

> Offer its good offices to the States Parties and Member States in the event of a nuclear accident or radiological emergency.

101. The International Institute of Humanitarian Law adopted a corresponding approach in its 1993 Guiding Principles on the Right to Humanitarian Assistance (San Remo Principles),[138] of which Principle 5 provides that:

> National authorities, national and international organizations, whose statutory mandates provide for the possibility of rendering humanitarian assistance, such as the ICRC, UNHCR (Office of the United Nations High Commissioner for Refugees), other organizations of the United Nations system, and professional humanitarian organizations, have the right to offer such assistance when the conditions laid down in the present Principles are fulfilled. This offer should not be regarded as an unfriendly act or an interference in a State's internal affairs. The authorities of the States concerned, in the exercise of their

[138] IHHL, "Guiding Principles on the Right to Humanitarian Assistance", *International Review of the Red Cross*, vol. 33, No. 297 (1993), p. 521.

sovereign rights, should extend their cooperation concerning the offer of humanitarian assistance to their populations.

102. Non-governmental humanitarian organizations have also played a pivotal role in disaster response. The General Assembly was keen in recognizing as much, when in resolution 43/131 (Humanitarian assistance to victims of natural disasters and similar emergency situations) it stated:

> The General Assembly,
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> ...
>
> Aware that alongside the action of Governments and intergovernmental organizations, the speed and efficiency of this assistance often depends on the help and aid of local and non-governmental organizations working with strictly humanitarian motives,
>
> ...
>
> 3. Stresses the important contribution made in providing humanitarian assistance by intergovernmental and non-governmental organizations working with strictly humanitarian motives;
>
> 4. Invites all States in need of such assistance to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential;
>
> 5. Appeals, therefore, to all States to give their support to these organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations.

103. The offer of assistance by non-governmental humanitarian organizations is, therefore, a crucial aspect of the present project, which can also be found in prior developments of international law. Most of the instruments recognizing the right of States and international organizations also extend that benefit to humanitarian organizations. In the context of international humanitarian law, common article 3 of the 1949 Geneva Conventions and article 18 of Protocol II (both quoted in paras. 86 and 87 above) recognize the right of humanitarian organizations to offer their assistance in the case of conflict.

104. The Guiding Principles on Internal Displacement,[139] in turn, establish under Principle 25:

> 1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
>
> 2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

[139] E/CN.4/1998/53/Add.2.

105. Recent international practice suggests the existence of extensive and consistent practice of States and international and non-governmental organizations making offers of assistance to a State affected by a disaster. According to press reports, in response to the Japanese earthquake and tsunami of 11 March 2011, offers of assistance were made as of 17 March by about 113 countries.[140] Likewise, press and United States congressional sources report that in the aftermath of Hurricane Katrina in 2005, a large number of States offered US$ 854 million in cash and in kind to the United States of America.[141] Similarly, many international organizations have made offers of assistance to States affected by disaster. For example, according to press information, after the Haiti earthquake of 12 January 2010, the European Union offered €337 million in aid to the ravaged country.[142] In addition to about 113 States which offered assistance to Japan following the 2011 earthquake and tsunami, 28 international organizations offered humanitarian assistance.[143]

106. The Special Rapporteur concludes that the right to offer assistance is not limited to non-affected States, but applies also to international organizations whose mandate may be interpreted as including such offer, and other humanitarian organizations. Through the recognition of this right, the present projects complete the landscape of relevant actors needed to achieve the interest of the international community in the protection of persons in the event of disasters.

C. Non-interference

107. International instruments providing for a right to offer assistance by relevant actors in case of disaster or similar situations are consistent in reiterating the basic assumption of the Special Rapporteur's third report that any such offer shall not be regarded as interference in the internal affairs of the beneficiary State nor an infringement on its sovereignty. For example, article 3, paragraph (b), of the Framework Convention on Civil Defence Assistance[144] states that offers of assistance should not be viewed as interference in the internal affairs of the beneficiary State. Similarly, Principle 5 of the Guiding Principles on the Right to Humanitarian Assistance contains a provision that offers of assistance should not be regarded as an unfriendly act or an interference in a State's internal affairs.[145]

108. Legal instruments in related areas provide likewise. The Guiding Principles on Internally Displaced Persons provides that offers of assistance should not be regarded as an unfriendly act or an interference in the affected State's internal affairs.[146] The commentary to article 18 of Additional Protocol II of the 1949 Geneva Conventions also states that offers made by the International Federation of

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[140] For a full list of offers of assistance by States, see Reuters, "Factbox: Aid and rescue offers for Japan quake", 17 March 2011.

[141] Bill Rodgers, "Katrina Foreign Aid Handling Generates Criticism", VOA News, 14 May 2007.

[142] Reuters, "EU offers over 400 million euros quake aid to Haiti", 18 January 2010.

[143] Reuters, "Factbox: Aid and rescue offers for Japan quake", 17 March 2011.

[144] See para. 91 above.

[145] *Guiding Principles on the Right to Humanitarian Assistance*, adopted by the Council of the International Institute of Humanitarian Law in April 1993, Principle 5, available at *International Review of the Red Cross*, vol. 33, No. 297 (1993), pp. 522 and 523.

[146] Representative of the Secretary-General on internally displaced persons, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, annex, Principle 25, para. 2.

the Red Cross should not be considered an interference in the internal affairs of the State or as infringing its sovereignty, whether or not the offer is accepted.[147]

109. In the light of the foregoing, the Special Rapporteur proposes the following draft article 12 on the right to offer assistance:

Draft article 12
Right to offer assistance

In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.

[147] Claude Pilloud, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), para. 4892.